

SYMPOSIUM ON POST-CONVICTION REMEDIES: FOREWORD AND AFTERWORD

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FOREWORD

The title of this symposium might well have been "Ohio Habeas Corpus: Remedy Extraordinary or Illusory?" were it not for the fact that, on July 21, 1965, a new post-conviction remedy became effective in Ohio.¹ Prior to that date, four avenues of direct (as opposed to collateral) post-conviction relief were *theoretically* available to one who had been convicted. Three of these avenues—motion in arrest

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¹ Ohio Rev. Code Ann. §§ 2953.21-24 (Page Supp. 1965) reads as follows:
Section 2953.21:

A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

Unless the petition and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto.

If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, it shall vacate and set aside the judgment, and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Costs shall be taxed as in habeas corpus proceedings.

Section 2953.22:

A court may entertain and determine a petition filed pursuant to section 2953.21 of the Revised Code without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second petition or successive petitions except for good cause shown for similar relief on behalf of the same prisoner.

Section 2953.23:

An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code shall be deemed a final judgment and may be appealed pursuant to Chapter 2505 of the Revised Code.

Section 2953.24:

A court in which a petition is filed pursuant to section 2953.21 of the Revised Code may appoint and fix the compensation of counsel for the petitioner pursuant to sections 2941.50 and 2941.51 of the Revised Code.

of judgment,² motion for a new trial,³ and appeal as of right⁴—were, for a variety of reasons, inadequate for an effective review of alleged constitutional defects. Important among these reasons were a short period of limitation and the fact that many defendants were unrepresented.⁵ The fourth avenue—a discretionary motion for leave to appeal—was inadequate for the reason that a court of appeals seldom exercised its discretion in favor of granting the motion.⁶

As a result of the practical inadequacy of direct devices, the burden of attempted post-conviction relief was borne by Ohio's only collateral device, a habeas corpus proceeding which could be initiated in the Ohio Supreme Court. However, in response to an ever-increasing volume of habeas corpus petitions, the Ohio Supreme Court severely limited the scope of the remedy. Ignoring the federal rule that constitutional defects were jurisdictional defects for purposes of post-conviction relief,⁷ the Ohio Supreme Court held that relief would be granted only in those cases in which the trial court lacked either personal or subject-matter jurisdiction in the traditional sense of those

² Ohio Rev. Code Ann. § 2947.02 (Page 1953).

³ Ohio Rev. Code Ann. § 2945.79 (Page 1953).

⁴ Ohio Rev. Code Ann. § 2953.05 (Page Supp. 1965).

⁵ A motion in arrest of judgment must be made within three days after rendition of verdict. Ohio Rev. Code Ann. § 2947.03 (Page 1953). A motion for a new trial must be filed within the same period unless counsel is unavoidably prevented from doing so. However, if the motion is based on newly discovered evidence, the period is 120 days, and the period may be extended for compelling reasons. Ohio Rev. Code Ann. § 2945.80 (Page Supp. 1965). An appeal as of right must be filed within thirty days after judgment and sentence. Ohio Rev. Code Ann. § 2953.05 (Page Supp. 1965).

I have been informed by the Honorable John J. Duffey of the Court of Appeals for Franklin County that, of the 737 criminal cases tried in Franklin County in 1964, 673 involved pleas of guilty. Obviously, most of the defendants who pleaded guilty were not represented by counsel.

⁶ The motion for leave to appeal is governed by Ohio Rev. Code Ann. § 2953.05 (Page Supp. 1965). In *State v. Green*, 1 Ohio St. 2d 102, 204 N.E.2d 684 (1965), the defendant stated that he was unrepresented. Without advising the defendant of his right to counsel, the trial court accepted a plea of guilty to rape. Although the trial court's failure to advise the defendant was in flagrant disregard of the defendant's constitutional rights [see *Carnley v. Cochran*, 369 U.S. 506 (1962); *Von Moltke v. Gillies*, 332 U.S. 708 (1948)] the Court of Appeals denied leave to appeal. Fortunately, the decision was reversed by the Ohio Supreme Court. Not so fortunate, however, was the defendant in *Perry v. Maxwell*, 175 Ohio St. 369, 195 N.E.2d 103 (1963). Claiming that he had pleaded guilty to an indictment that did not allege an offense, the defendant moved for leave to appeal. The motion was denied without opinion, and the denial was affirmed also without opinion. Defendant's subsequent petition for habeas corpus was denied on the ground that the issue could be raised in appellate proceedings only.

⁷ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

terms.⁸ Although the court did not invariably adhere to its own rule,⁹ it did so with sufficient frequency to justify the observation that habeas corpus was a pre-conviction rather than a post-conviction remedy.¹⁰

But the unavailability of habeas corpus relief did not deter prisoners from seeking relief. To the contrary, hope continued to spring eternal, and the number of habeas corpus petitions mounted.¹¹ It was then that the Ohio Legislature enacted the post-conviction statute. The bill was passed as an emergency measure for the reason that

habeas corpus petitions proceedings alleging violation of constitutional rights have increased in the courts to such an extent that a new procedure appears to be the best method of protecting constitutional rights of individuals and, at the same time, providing a more orderly method of hearing such matters.¹²

The intent of the legislature was clear. Although the legislature was constitutionally prohibited from suspending the writ of habeas corpus,¹³ there was no barrier to the creation of a different remedy which had to be utilized before a prisoner could even hope to obtain relief under the extraordinary writ. By its enactment of the new statute, the legislature intended to abort most petitions for habeas corpus, and, to date, the statute has generally had that effect.¹⁴

The scope of the new statute appears to be much broader than the scope of habeas corpus. Relief is to be granted "if the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment *void or voidable* under the Ohio Constitution or the Constitution of the United States."¹⁵ Under the new act, relief is available to "a prisoner in custody under sentence." To initiate a post-conviction proceeding, the prisoner files a verified petition in the sentencing court.¹⁶ There is no period of limitations.¹⁷ The sentencing court is required to hold a hearing unless it is satisfied

⁸ This development in Ohio law is extensively discussed in Note, 26 Ohio St. L.J. 496 (1965).

⁹ *Id.* at 506 n.60.

¹⁰ *Id.* at 506 n.62.

¹¹ *Id.* at 497 n.10.

¹² 113 Ohio Laws 383, § 2 (1965). This section of the statute was not codified.

¹³ Ohio Const. art. I, § 8. See *Kott v. Maxwell*, 3 Ohio App. 2d 337, 338, 210 N.E.2d 746, 747 (1965).

¹⁴ See *Freeman v. Maxwell*, 4 Ohio St. 2d 4, 6, 210 N.E.2d 885, 886-87 (1965); *Kott v. Maxwell*, *supra* note 13.

¹⁵ Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965). (Emphasis added.)

¹⁶ *Ibid.*

¹⁷ *Ibid.*

from an inspection of the files and records of the case that the petitioner is not entitled to relief.¹⁸ Even though a hearing is to be held, both the production of the petitioner and the appointment of counsel are within the court's discretion.¹⁹ Whether the court grants or denies relief, its order is appealable.²⁰ Finally, the court is not required to entertain successive petitions for similar relief unless good cause is shown.²¹

Even a superficial consideration of the post-conviction statute suggests a plethora of problems: (1) Under what circumstances does a denial of constitutional rights render a criminal judgment "void or voidable"? (2) Is a criminal judgment to be deemed "void" for reasons other than those that were sufficient to warrant habeas corpus relief? (3) If, on an appeal, a judgment would have been reversed for constitutional errors, do those errors invariably render the judgment "voidable" within the post-conviction statute? (4) When is a petitioner "in custody"? Is he "in custody" if he is on parole or probation? Is he "in custody" if he has been unconditionally released from state supervision after the institution of post-conviction proceedings? (5) Does the post-conviction procedure apply to juveniles? (6) Does it apply to misdemeanants? (7) May an habitual offender use the new post-conviction procedure to attack one of the antecedent convictions which stamped him a recidivist? (8) May a prisoner who is serving the first of several consecutive sentences attack any of the wholly unserved sentences? (9) May a prisoner who is serving concurrent sentences attack one of the sentences even though he admits that another sentence is valid and that he is not entitled to immediate release? (10) In view of the fact that the conviction was the product of a prior judicial proceeding, what is the impact of (a) failing to raise the issue in the prior proceeding; (b) raising the issue and losing; (c) raising the issue, losing, and either not appealing or not raising the issue on appeal; (d) raising the issue on appeal and losing; and (e) pleading guilty? (11) What are the petitioner's *constitutional* rights in a post-conviction proceeding? Does he have a *constitutional* right to counsel, to a transcript of the prior proceeding, to a transcript of the post-conviction proceeding, or to be present at the post-conviction proceeding?

Answers to most of these questions cannot be found by the

¹⁸ *Ibid.*

¹⁹ Ohio Rev. Code Ann. § 2953.22 (production), 2953.24 (appointment of counsel) (Page Supp. 1965).

²⁰ Ohio Rev. Code Ann. § 2953.23 (Page Supp. 1965).

²¹ Ohio Rev. Code Ann. § 2953.22 (Page Supp. 1965).

simple expedient of consulting Ohio case law for the reason that no Ohio case has involved a similar procedure and, therefore, the questions have not arisen. The statute itself affords scant guidance, and its legislative history is equally unrevealing. The statute was not the product of a process of analysis and drafting carefully tailored to meet the inadequacies of habeas corpus procedures. Rather, the statute was copied almost verbatim from a Nebraska statute²² which had been enacted three months earlier and which was barren of case-law gloss when the Ohio statute was adopted.

Answers to the questions posed above bid fair to tax the ingenuity and imagination of the Ohio bench and bar. Some early returns are in and they are disquieting. In a case in which the petition was dismissed without a hearing, the trial judge failed to consider all of the allegations of the petition and thereby forced the petitioner to appeal in order to obtain a judicial articulation of the issues.²³ In another case in which the petition was dismissed without a hearing, the petitioner, unrepresented by counsel, was unable to perfect an appeal in a distant county. Instead, after time for appeal had run, petitioner sought habeas corpus relief in the county of incarceration. The court of appeals held that the unrepresented petitioner had not been afforded adequate appellate post-conviction procedures, that his failure to appeal was not a failure to exhaust an adequate alternate remedy, and that habeas corpus relief was available.²⁴ The decision, undeniably correct, is a clear indication that the post-conviction statute will not serve its intended purpose unless it is administered with due regard for the plight of the immobile and unrepresented petitioner. Perhaps the most horrible example of the type of maladministration that threatens to gut the statute is the recent, unreported case in which the trial judge did not even pass upon the allegations of the petition. Instead, he wrote a letter to the incarcerated petitioner telling him, in a nice way, that the trial had been a fair one and suggesting that post-conviction proceedings were unnecessary.²⁵

Obviously, guidance is necessary, and it is the purpose of this symposium on post-conviction remedies to give guidance where none readily appears in the local law. Although the post-conviction pro-

²² The Nebraska statute is reprinted in *Case v. Nebraska*, 381 U.S. 336, 341-42 n.4 (1965).

²³ *Porter v. Green*, 4 Ohio App. 2d 336, 212 N.E.2d 618 (1965).

²⁴ *Schumann v. Maxwell*, No. 8249, Franklin County Ct. App., Dec. 6, 1965.

²⁵ I learned of this case from a very reliable hearsay informant and I personally read the letter. From the same informant I recently learned that the prosecuting attorney ultimately was able to obtain a final and appealable order of dismissal, that an appeal was filed, and that the prosecuting attorney intends to confess error on the merits of the post-conviction petition.

cedure is new to Ohio, it is no stranger to the law of other jurisdictions, particularly the federal jurisdiction, Illinois, and Oregon. Courts in these three jurisdictions have had considerable experience in interpreting and administering post-conviction statutes. They have developed a substantial body of case law. Although the cases deal with statutes somewhat different in phraseology from the Ohio statute, the cases are quite relevant because they attempt to resolve the basic problem inhering in any post-conviction remedy: accommodating the goal of a procedure adequate to preserve all meritorious cases with the conflicting goal of a procedure that either will discourage or will quickly and accurately sift out frivolous petitions.

The articles that follow treat in depth a variety of problems that have arisen under the federal, Illinois, and Oregon statutes. The articles serve not only to identify the problems but also to analyze critically the solutions attempted by specific jurisdictions. It may be that in no jurisdiction has there been a successful reconciliation of the conflicting goals referred to above; perhaps success is impossible; but whatever the case, a critical evaluation of past solutions is an indispensable first step to the sort of creative lawyering and judging demanded by Ohio's post-conviction statute.

AFTERWORD

Ordinarily, an afterword would not precede the subject of discussion, but in this instance it is peculiarly appropriate to refer immediately to a matter even more vital to fair criminal process than post-conviction relief: the adequacy of pre-conviction procedures. The articles that follow discuss a number of cases in which post-conviction relief was granted. Each of these cases demonstrates that the criminal process is agile enough to catch up with its mistakes. Unfortunately, each of these cases also demonstrates that the process is not sufficiently agile to avoid mistakes. Well-founded concern for the adequacy of post-conviction procedures should not be permitted to obscure the fact that such procedures are but a cure for an illness in a specific case and that they neither eliminate nor prevent the disease on a wholesale basis. The critical problem is not cure but prevention, and prevention demands a special sensitivity or awareness. Both judge and prosecutor must be sensitive to emerging legal doctrines; they must make themselves aware of probable lines of development; they must implement rather than resist benign and fair procedures; and, importantly, they must manifest their implementation on the record.

Ohio's experience with prevention has not been a particularly happy one. Take the right to counsel as an example. Ohio has long had a statutory procedure for the appointment of counsel in criminal

cases.²⁶ But the procedure is meaningless unless defendants are properly advised of their rights and unless both judge and prosecutor seek to insure that any waiver of counsel is intelligent and voluntary. Due regard not for mere amenities but for the necessities of fair criminal process would seem to require that the accused be informed that the right exists; that the right is an important one; that, even if the accused is disposed to plead guilty, counsel can serve the valuable purposes of advising on the wisdom of a particular plea, of negotiating a plea, and of introducing mitigating or extenuating evidence; and that exercise of the right will impose no expense either on the accused or on his family.²⁷ However, recent cases indicate either that such advice is not given or that such advice, if given, is not reflected by the record.²⁸ Moreover, they indicate that the Ohio Supreme Court is willing to invoke almost any presumption of regularity in order to read a bare-bones record against the accused.²⁹

The cases referred to immediately above are habeas corpus cases. Perhaps they were intended to serve no purpose other than telling the habeas corpus petitioner: "You can't get there from here." But the de-emphasis of habeas corpus effected by the new statute gives no assurance that the cases will be ignored. Indeed, these cases may shape decisions under the new statute. If so, the result will be disastrous. But the disaster will be no greater than the encouragement already given by these cases to trial judges to engage in blind and sloppy procedures.

No system administered by humans can ever be free of human error. Mistakes will be made even under the best of circumstances. Because they will not immediately be rectified, an effective, collateral post-conviction procedure is essential. But the most pressing need is for a root-and-branch overhaul of the entire trial criminal process, an overhaul in which bench, bar, and legislature pay heed to the late Justice Frankfurter's admonitions that "not the least significant test of the quality of a civilization is its treatment of those charged with crime. . . ."³⁰ and that "the history of liberty has largely been the history of observance of procedural safeguards."³¹

²⁶ See Ohio Rev. Code Ann. § 2941.50 (Page Supp. 1965) and predecessor statutes.

²⁷ See *Carnley v. Cochran*, 369 U.S. 506 (1962); *Von Moltke v. Gillies*, 332 U.S. 708 (1948); Note, 25 Ohio St. L.J. 435 (1964).

²⁸ See *Lester v. Haskins*, 3 Ohio St. 2d 205, 208-09, 210 N.E.2d 264, 265-66 (1965) (concurring opinion); *Gates v. Haskins*, 3 Ohio St. 2d 27, 29, 208 N.E.2d 920, 921 (1965) (concurring opinion).

²⁹ *Conlan v. Haskins*, 177 Ohio St. 65, 202 N.E.2d 419 (1964); *Doughty v. Sacks*, 175 Ohio St. 46, 191 N.E.2d 727 (1963), *rev'd sub nom.* *Doughty v. Maxwell*, 376 U.S. 202 (1964). See also cases cited in note 28 *supra*.

³⁰ *Irvin v. Doud*, 366 U.S. 717, 729 (1961) (concurring opinion).

³¹ *McNabb v. United States*, 318 U.S. 332, 347 (1943).